86-1000

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RODNEY WHEELER, et al.

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Were federally employed civilian firefighters wrongfully denied overtime wages under the Fair Labor Standards Act, 29 U.S.C. sections 201, et seq.?

PARTIES TO THE PROCEEDING

This action involves 2187 plaintiffs. Their names are listed in Appendix D, filed herewith. The defendant is the United States of America.

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OPINIONS BELOW

The decision of the United States Court of Appeal for the Federal Circuit in the case of Rodney Wheeler, et al. v. United States of America, No. 86-1043 was not published. This decision appears in Appendix A filed herewith. The decision of the United States Claims Court in the case of Rodney Wheeler, et al. v. United States of America, No. 528-82 C, was published at 9 Cl.Ct. 579 (1986). This decision appears in Appendix B as pages 1 through 30. The Memorandum Decisions, Orders and Judgment of the Untied States District Court in the case of Rodney Wheeler, et al. v. United States of America, No. CV-80-4512 AWT, were not published. These items appear in Appendix B as pages 31 through 58. The judgment sought to be reviewed is attached as Appendix C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was entered on September 18, 1986. A Petition for Writ of Certiorari to review the decision of a Federal Court of Appeals in a civil case can be filed with this court within ninety (90) days of entry of judgment. 28 U.S.C. section 2101(c). The jurisdiction of this court to review by Writ of Certiorari the decision of a Federal Court of Appeals in a civil case is invoked pursuant to 28 U.S.C. section 1254(1).

THE STATUTES AND REGULATIONS INVOLVED

29 U.S.C. Section 207. Maximum Hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

. . .

(k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement

activities (including security personnel in correctional institutions) if

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the less of of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975;

. . .

Compensation at a rate not less than one an one-half times the regular rate at which he is employed.

D. Computation of Overtime Pay Entitlement - FLSA

1. Computation of "Regular Rate" - FLSA

An employee's regular rate of pay must first be determined in order to compute his overtime pay entitlement under the FLSA. Section 7(e) of the FLSA requires inclusion in the "regular rate" of "all remuneration for employment paid to, or on behalf of, the employee" except for certain specific exclusions. Premium pay on an annual basis for regularly scheduled standby duty (5 U.S.C. 5545(c)(1)) and premium pay on an annual basis for administratively uncontrollable work (5 U.S.C. 5545(c)(2)) do not qualify as statutory exclusions from the "regular rate" and therefore, they are include in computing an employee's total remuneration.

The employee's hourly "regular rate" is then determined by dividing the employee's total remuneration for employment in any work period by the total number of hours in the employee's tour of duty under the FSLA (all hours actually on duty including scheduled and unscheduled periods).

Regular Rate =

$$\frac{\text{Total Remuneration for the Work Period}}{\text{Tour of Duty}}$$

The regular rate of pay at which the employee is employed shall in no event be less than the statutory minimum specified under section 6 of the FLSA. (See attachment 3 to FPM Letter 551-1 for the appropriate minimum wage rates).

2. Computation of Overtime Pay - FLSA

Once an employee's hourly "regular rate" is determined, the employee is then entitled to additional compensation at a rate of one-half times the "regular rate" for each

hour the employee's tour of duty exceeds the maximum hours limitation of section 7(k) of the FLSA.

Additional = ½ X Regular Rate X Number Of Overtime Hours Compensation

NOTE: The employee's additional compensation for overtime work is computed at one-half times the "regular rate" and not one and one-half times the "regular rate" for all overtime hours under the FLSA. A simple explanation is that in computing an employee's total remuneration for the work period, the employee has already been compensated at 100 percent for all hours in his tour of duty. Therefore, once the employee's "regular rate" is computed, the employee is then entitled to additional compensation of 50 percent times his "regular rate" for those hours in excess of the maximum hours limitation of section 7(k) of the FLSA. This method of computing an employee's overtime

entitlement under the FLSA results in the employee being compensated for overtime work at a rate of "one and one-half times the regular rate at which he is employed."

STATEMENT OF THE CASE

Plaintiffs are federally employed civilian firefighters. They are employed at various military and federal installations throughout the United States, its protectorate territories and foreign bases. Their usual tour of duty consists of twelve shifts of 24 hours in a twenty-eight day work period for a total of 288 hours.

The parties agree that under the Fair Labor Standards Act (29 U.S.C. sections 201, et seq. as amended), plaintiffs are entitled to 1½ times their regular rate of pay for all hours worked in excess of 212 hours in a 28 day period. See 29 U.S.C. section 207(k) (1982). Thus, plaintiffs should receive overtime wages for 76 hours per month.

In order to compute this overtime pay, it is first necessary to determine plaintiffs "regular rate" of pay, since

overtime is 1½ times this "regular rate." This is where the parties disagree.

Under a long line of United States Supreme Court cases, an employee's regular rate of pay is the hourly rate paid for the normal non-overtime work week. See, e.g., Walling v. Helmerick & Payne, Inc., 323 U.S. 37, 40 (1944); Walling v. Youngerman - Reynolds Hardwood Company, 325 U.S. 419, 424 (1945). Accordingly, plaintiffs' regular rate of pay should be computed by dividing their total compensation by the non-overtime hours worked.

In the case of Mr. Wheeler, a GS-4 Step 6 employee in 1980, this would mean $1104 divided by 212 hours = $5.2075 per hour. Mr. Wheeler would then obtain overtime pay of 1½ x $5.0725 x 76 overtime hours = $578.27, for a total monthly compensation of $1682.27.

The United States disagrees and argues that Mr. Wheeler's regular rate is arrived

at by dividing his total compensation by all hours worked, whether overtime or non overtime. Thus, $1104 divided by 288 = $3.833 per hour. See FPM 551-5, Attachment 2.

It is imperative to note that this method of computation directly resulted in certain plaintiffs receiving less than the statutory minimum wage as directed by 29 U.S.C. section 206. These plaintiffs were awarded money damages by the District Court for these minimum wage violations. See Appendix B, pages 35, 39, 40, 43.

The United States further compounds this error by asserting that Mr. Wheeler's overtime rate is only one-half x $3.833 x 76 overtime hours which yields $145.654. The United States argues that Mr. Wheeler has already been compensated one time for the 76 overtime hours since it was included in determining his regular rate. See FPM 551-5, Attachment 2. Under the Govern-

ment's method of computation, Mr. Wheeler received total monthly compensation of $1249.65.

The issues are therefore (1) whether plaintiffs regular rate of pay is computed by dividing their compensation by all hours worked as opposed to non overtime hours; and (2) whether plaintiffs' regular rate of pay is multiplied by 1½ times or only ½ times to obtain their overtime rate of pay.

JURISDICTION IN THE COURTS BELOW

Jurisdiction in the United States District Court and the United States Claims Court was invoked pursuant to 29 U.S.C. section 201, et seq. and 28 U.S.C. sections 1337, 1346(a)(2), 2201 and 2202.

ARGUMENT IN SUPPORT OF GRANTING THIS WRIT

A. The Decision Of The Court Of Appeals For The Federal Circuit Is In Conflict With The Ninth Circuit Court Of Appeals.

In 1982 the Ninth Circuit Court of Appeals decided the case of Oliver v. Mercy Medical Center, Inc., 695 F.2d 379 (1982). In that action, the employer used the same method of computing the employees' regular and overtime rates of pay as that advanced by the government here. The court unanimously ruled that this method of pay was not in accordance with the Fair Labor Standards Act. 1/

1/ Although Oliver involved a non-federal employee, its holding is applicable to all employees covered by the Fair Labor Standards Act. The fact that certain federal employees such as petitioners receive premium pay for hardship and standby duty is irrelevant since such premium pay is included and considered when determining the employees regular rate of pay. See FPM 551-5 attachment 2.

The court did note that in certain limited instances, a fixed salary for fluctuating hours is permissible under 29 CFR section 778.114(a). However, this is not permissible where it will result in payment of less than the minimum wage or where there is not a clear mutual agreement between the parties. In this case, these issues were briefed and argued in the courts below. The District Court specifically found that the government's method of computing plaintiffs' regular rate did indeed violate the minimum wage laws. Nonetheless, the Claims Court and the Court of Appeals for the Federal Circuit have upheld the government's method of computing plaintiffs' regular rate.

Because of this conflict in the circuits, this writ should be granted.

B. The Decision Of The Court Of Appeals For The Federal Circuit Is In Conflict With The Decisions Of This Court.

As noted above, the cases of Walling v. Youngerman Reynolds Hardware Company, 325 U.S. 419 (1945) and Walling v. Helmerick & Payne, Inc., 353 U.S. 37 (1944) clearly state that the regular rate is an hourly rate paid for the normal non-overtime work week only.

Here the government contends that the regular rate is computed as an hourly rate on the basis of the non overtime work week, as well as the overtime work week. The government further contends that plaintiffs are only entitled to overtime at ½ times their regular rate and not 1½ times, since plaintiffs have already been paid once for those overtime hours when computing the regular rate. See FPM 551-5, Attachment 2.

Therefore, by its own admission, the government has computed and paid plaintiffs' regular rate as an hourly rate for both the non overtime a well as overtime work week. This result is contrary to the precedents of this Court.

Furthermore, in those limited instances where this Court has held that this method of computing the regular rate is appropriate, it was only in the special factual context of a fluctuating work week where the parties have a clear mutual agreement that such would be the case. Walling v. Helmerick & Payne, Inc., supra; Walling v. A.H. Belo Corporation, 316 U.S. 624 (1942); Overnight Motor Transport Company v. Missel, 316 U.S. 579 (1942). No evidence of such a contractual agreement was adduced in this case in the courts below and the judgment appealed from cannot be sustained on that basis. The decision is therefore in conflict with the

applicable decisions of this Court.

Because the decision of the Court of Appeals for the Federal Circuit is inconsistent with the prior decisions of this Court, this writ should be granted.

C. This Case Involves An Important Question Of Federal Law.

At the present time, there are thousands of federally employed civilian firefighters in addition to those who are parties to this case that will be affected by this decision. Additionally, there are thousands of federally employed law enforcement personnel which are subject to the Fair Labor Standards Act and therefore the decision under review. Furthermore, because of this Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 471 U.S. 1049 (1985), all state and municipal firefighters and law enforcement personnel are subject to the

Fair Labor Standards Act and therefore the pay computations currently under consideration by this Court.

Because of the broad reaching and all pervasive effect of this case, and because of this Court's recent expansion of the coverage of the Fair Labor Standards Act to state and municipal employees, the issues presented by this case will deeply affect a huge segment of our society. These individuals are entrusted with protecting us from calamity, disaster, crime and destruction and it should be incumbent upon us to insure that their compensation is in accordance with law and is appropriate to the life protecting functions in which they engage.

This important question of federal law should be settled by this court.

CONCLUSION

Because the decision of the Court of Appeals for the Federal Circuit is in conflict with the Ninth Circuit Court of Appeals, and is further in conflict with the prior decisions of this Court, and because this case presents an important question of federal law which affects not only federal employees but state and municipal employees, it is respectfully requested that this Honorable Court grant this petition for Writ of Certiorari.

Dated: December 15, 1986

Respectfully submitted,

Thomas Dean Wise

THOMAS DEAN WISE
Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Thomas Dean Wise, a member of the Bar of the Supreme Court of the United States and counsel of record for Rodney Wheeler, et al., petitioners herein, hereb certifies that on December 15, 1986 pursuant to Rule 28, Rules of the Supreme Court of the United States, I served three (3) copies of the foregoing Petition For Writ Of Certiorari together with three (3) copies of the Appendix thereto, on each of the parties herein by placing three (3) true copies thereof enclosed in a sealed envelope with postage thereon fully prepai in the United States mail at Santa Barbara California, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

Dated: December 15, 1986

Thomas D Wise

THOMAS DEAN WISE